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Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

Josh A. Allen,

Petitioner,

v.

State of Montana,

Respondent.

On Petition For Writ of Certiorari
To The Montana State Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a Citizen have a duty to identify himself to a policeman when he knows or has reason to believe that by identifying himself he will be revealing information that will be used against him in a second unrelated prosecution?

2. Can the State of Montana ignore established federal case law by not allowing a Citizen to testify in his own defense due to his religious beliefs?

3. Is M.C.A. 45-7-302: Obstructing a peace officer or other public servant vague and ambiguous under the 14th amendment? Is it written so broadly that a Citizen can be charged with a crime for exercising his Constitutional rights?

PARTIES TO THE PROCEEDING

The Petitioner here is Josh Allen, pro se.

The Respondent here is Mike Mattioli Montana State Assistant Attorney General.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Josh Allen respectfully requests that a writ of certiorari issue to review the opinion of the Montana State Supreme Court in this case and that the opinion of the Montana State Supreme Court be reversed.

OPINION BELOW

The opinion of The Montana State Supreme Court, and that of the District Court, is available in the Appendix.

STATEMENT OF JUSRISDICTION

The Montana State Supreme Court entered it's Appellate decision on March 24th ,2009. The Montana State Supreme Court denied Petitioner's motion for rehearing on May12th, 2009. Petitioner filed for an extension to file a writ of certiorari, (ref. doc.# 09a84) granted by Justice Kennedy on July 27th 2009, giving petitioner until August 25th 2009 to file the writ. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

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CONSTITUTIONAL PROVISIONS

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STATEMENT OF THE CASE

Petitioner, a resident of Montana, has had prior to this case, numerous late-night run-ins with law enforcement. Most of these occurred while jogging. These situations involved an officer(s) stopping and interrogated petitioner, always demanding identification. This led petitioner on a study of case law involving identification, including Terry v. Ohio, Miranda v. Arizona, Brown v. Texas etc.

The following is a statement of facts from the petitioner's point of view, as petitioner wasn't allowed to testify in District court and create any contested issues of fact.

On March 22, 2007, Petitioner was walking and jogging home from a Bar at about 2:00 a.m. Petitioner was walking from out behind a building when he saw a police car about one block away. The cars turn signal was activated at the last second, and the police car began to head toward petitioner. Petitioner, wanting to avoid a late night confrontation turned and walked back behind the building he had just walked out from. Petitioner went completely around the back of the building, and proceeded to jog down an open alley (not lined with buildings on both sides) in the same direction that he had been walking before he saw the police car. After about a half block of jogging, petitioner heard a siren and car behind him. Petitioner stopped as the car stopped and sheriff deputy Cory Matkin got out of the car. The deputy ordered petitioner face down to the ground, and immediately placed petitioner in handcuffs. He then asked petitioner why he was running. Petitioner replied he was jogging. The

deputy then asked petitioner his name. Petitioner responded by asking if this was an arrest. The deputy responded that it was a detention. Petitioner, concerned that he had a warrant out for his arrest for a speeding ticket, and believing this was an arrest, chose to exercise his right to remain silent and did not give the deputy his name, saying he would exercise his right to silence. Petitioner was frisked, and taken to the local jail. There, petitioner was identified by his driver's license. Petitioner was charged with Obstructing a Peace Officer, for refusing to identify himself, under Montana Code Annotated (M.C.A.) 45-7-302,[1] a misdemeanor, for which he served four and one half days in jail. Petitioner refused to enter a plea before the Justice of the Peace, instead entering an answer to the complaint (doc.# 14), citing several similar U.S. Supreme Court cases, and the fact that there was no law in Montana requiring one to identify oneself to a peace officer. During this trial, petitioner was allowed to take the stand and testify in his own defense without taking

[1] (1)The relevant section states that a person commits the offense of obstructing a peace officer or other public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant, including a person serving process, shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

the oath or an affirmation, even though petitioner did not give notice ahead of time, instead citing his religious beliefs and relevant case law in favor of them on the court room floor. The petitioner was found guilty of obstruction, and given time served and an $85.00 fine to cover court costs.

Petitioner filed a motion for trial de novo in District Court. Petitioner then filed an answer to the complaint and request for dismissal (docket# 36), on 1/07/2008. In this document (page 4) petitioner raises the first federal question, stated exactly as it is stated in this petition. The district court responds by declaring that disclosure of a Defendant's name is not testimonial and therefore not in violation of *Miranda*. See Appendix (App.) 6 para. 11. The Montana State Supreme Court responds to the same question (app. 5 Para. 11) by citing *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humbolt Co.*, 542 U.S. (2004). [2] "*A disclosure of a suspect's name will not implicate the self incrimination clause if it presents no reasonable danger of incrimination.*" The court's faulty logic in answering this question will be exposed below in the **reasons for granting the petition.** The second federal question is: can the

[2] Nev. Rev. Stat. (NRS) §171.123(3) provides that:

"The officer may detain the person pursuant to this section only to ascertain his identity and the suspicious circumstances surrounding his presence abroad. Any person so detained shall identify himself, but may not be compelled to answer any other inquiry of any peace officer." (continued on following page) [2]It was determined that by refusing to identify himself, Hiibel violated NRS §199.280, which states:

"A person who, in any case or under any circumstances not otherwise specially provided for, willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished ..."

State of Montana ignore established federal case law, and the first, fifth, sixth and fourteenth U.S. Constitutional amendments by not allowing a Citizen to testify in his own defense due to his religious beliefs? This issue was first raised when the District court was notified of Petitioner's stance on the oath issue by way of His "notice of refusal to swear or affirm to take an oath" (doc. #52) (app. 24-25) filed almost one month ahead of trial. During the trial, the Judge admits he didn't even bother to read the notice (trial transcripts page 38-39), which was well grounded in Federal case law at *Gordon v. Idaho, 778 F2d 1397 9th* (1985).

The district court decided this question at trial by way of not allowing petitioner to testify (trial transcripts page 38-41), Making the Montana rules of evidence superior to the 9th circuit's decision and U.S. Supreme Court Decisions. The Montana State Supreme Court answered the issue (App.7 para. 14) exactly opposite to the intent of *Gordon v. Idaho*. 9th fed.

The third federal question raised by petitioner is whether M.C.A. 45-7-302, is unconstitutionally vague and ambiguous in the same vein as California's Stop and identify statute which was ruled unconstitutional in *Kolender v. Lawson, 461 U.S. 352 (1983).* This was raised by petitioner in his answer to the complaint page (doc.# page 5) and refined in his appeal brief(s). The district court answers (app.14 para.8). The Montana State Supreme Court agreed with the District Court (app.6 para.12).

Petitioner timely filed a motion for rehearing, which was denied on May 12, 2009. This timely petition then followed.

REASONS FOR GRANTING THE PETITION

The Montana Supreme Court inconclusively answers a question of national importance; which if answered, would help the general public better understand what their Miranda rights are. The Montana Supreme Court also decided important legal questions pertaining to equal protection and due process contrary to the 9th federal circuit.

1. The Montana State Supreme Court answers the first federal question in an illogical manner, inconsistent with U.S. Supreme Court case law, and contrary to the intent of Montana law.

A. This petition for a writ of certiorari presents a simple question: Does a Citizen have a duty to identify himself to a policeman when he knows or has reason to believe that by identifying himself he will be revealing information that will be used against him in a second unrelated prosecution? The Montana Supreme Court (App. 2 para. 3) cites as a finding of fact that Deputy Matkin wanted petitioner's name for the purpose of looking for arrest warrants. The petitioner stated that the reason he didn't give his name was that he was concerned that he had a warrant for a speeding ticket (doc. 36 page, 4). This would obviously make petitioners name the beginning link in a chain of evidence that could be used against him to convict him of a separate offense. The Montana Supreme Court struck down this defense (App. 5 para. 11), with the following:

> "A disclosure of a suspect's name will not implicate the self-incrimination clause if it presents "no reasonable danger of incrimination." *Hiibel*, 542 U.S. at 189, 124 S. Ct. at 2460. Allen asserted that he did not

> provide his name because he was afraid he would be arrested for outstanding speeding tickets. However, this allegation was unsubstantiated, as a criminal history and warrants check run on Allen after his arrest showed no outstanding warrants or criminal history. This being so, the act of providing his name provided no reasonable danger to Allen that he would incriminate himself, nor would it furnish a link in a chain of evidence which could be later used to prosecute him. *Hiibel*, 542 U.S. at 190, 24 S. Ct. at 2461. Thus, the disclosure of Allen's name to Deputy Matkin, under the circumstances of this case, would not have been incriminating".

This is backwards logic. According to the Montana Court, a person would have to first prove that there was a danger of incriminating oneself with their name, in order to gain the fifth amendment protection of not providing it due to its incriminating nature. According to the logic put forth by the Montana Court, one only has 5th amendment protection if there is absolute proof beyond a shadow of a doubt, that there is something incriminating with which to need its protection. Which in turn would imply that the person bring forth the incriminating evidence to gain the protection of the 5th amendment. Obviously, by then the damage is done. The U.S. Supreme Court declared that:

> "The privilege afforded not only extends to answers that would in themselves support conviction under a federal criminal statute but likewise embraces those which would furnish a link in a chain of evidence needed to prosecute the claimant for a federal

crime.....*The claimant is not required to prove the precise danger since by so doing he would be forced to disclose those very facts from which the privilege protects. Hoffman v U.S. (CF 341 U.S. 479,486,71 CT. 814,818,95 L Ed 1118.* (1951)

"The (5th amendment privilege is not limited to testimony, as ordinarily understood, but extends to every means by which one may be compelled to produce information which may incriminate." Boyd vs. U.S._Supra; Brown vs Walker, 161, U.S. 591. (1896)

The United States Supreme Court stated further that all rights and safeguards contained in the first eight amendments to the federal constitution are equally applicable in every state criminal action, "Because a denial of them would be a denial of due process of law." William Malloy vs Patrick J. Hogan, 378 U.S. 1, 84 S. Ct. 1489. Argued March 5, 1964, decided June, 15, 1964.

Where rights secured by the constitution are involved, there can be no rulemaking or legislation which would abrogate them." Miranda v. Arizona 384 U.S. 436 at 491. (1966)

"The claim and exercise of a constitutional right cannot be converted into a crime." Miller v. U.S. 230 F 486 at 489.

Officer Matkin admits that he wants Petitioner's name in case he discovers some offense later, in order to find him (App. 11 para.6). Petitioner has brought up (doc. #36 page4) an extreme example

of a name being incriminating or being the beginning link in a chain of evidence: if a Middle Eastern man with a beard was stopped and questioned about his name, and he said he was Osama Bin Laden, he would be arrested immediately. Petitioner hopes it is obvious to the learned court, all of the possible occasions in which a name could easily be the beginning link in a chain of evidence to convict him of a separate offense. Petitioner would also ask the Court to take notice that the factual circumstances in *Hiibel* are arguably distinguishable from those of Petitioner's. They are different in that in Hiibel's case, officers were notified of a disturbance and called out to a scene. In Petitioner's case, the officer's were acting in their own unfettered discretion. Nevada law also specifically requires a person to identify themselves to a peace officer, the language in the Montana statute as discussed below, indicates just the opposite. Petitioner resents the repeated attempts to bootstrap Nevada law to him.

B. Montana, unlike other states has no specific law requiring one to identify oneself to a peace officer on demand. Petitioner brought this up during the proceedings in justice court (doc.# 14.0) and the State responded with M.C.A 46-5-401 as the law that requires this (doc.# 15). ` In fact the language in M.C.A 46-5-401. Investigative stop and frisk indicates the intent of the lawmaker is not to require a name when on foot.: (1) In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of a vehicle has committed, is committing or is about

to commit an offense.....(2) A peace officer who has lawfully stopped a person or vehicle under this section may: (a) request the person's name and present address and an explanation of the person's actions and, if the person is a driver of a vehicle, demand the person's drivers license and the vehicle's registration and proof of insurance.....

The petitioner would ask the Court to take note of two different words, request and demand, in the same sentence, both pertaining to the reason for the initial stop. The word demand is used when the person is the driver of the vehicle. The word demand if looked up in a legal dictionary, gives a corresponding legal duty to supply what is demanded. Defendant agrees 100% that due to the contractual nature of having a drivers license that the word demand is appropriate, and there is a legal duty to supply it. This same contractual duty extends to taking a breathalyzer when you have a driver's license. However the word request is used in circumstances other than driving such as the Petitioner being on foot. A look at the word request in a legal dictionary shows no corresponding legal duty to supply that which is requested. Notice that the person's name, address and an explanation of the person's actions all fall under the word request. As an example, if the person were engaged in an illegal activity, and the officer requested an explanation of his actions, that person would be under the 5th amendment and would have no corresponding duty to confess, and could not be punished for failing to explain to the officer what he was doing. If the lawmakers had intended to make it mandatory for people to give their name to an officer, they would have used the word demand instead of request.

Petitioner has brought this up in the pleadings, in his Answer and Demurr to complaint (doc# 36) and at the preliminary hearing (page 40-43). Montana has no law requiring one to identify oneself to an officer, thus Petitioner is being punished for a "noncrime" just as if he had plead into a fiction of law.

C. M.C.A. 45-7-302. Obstructing a peace officer or other public servant, by way of allowing the State to charge Petitioner with a crime for refusing to identify himself, automatically implies that it imposes a duty to identify oneself to a peace officer, even though it doesn't declare that in writing. Thus even though it broadly defines obstruction, the District Court and the State are construing it to compel specific performance not specifically mentioned. This is what makes it vague and ambiguous under the 14th amendment. M.C.A 45-7-302. Obstructing peace officer or other public servant, as being construed by the District court is even more unconstitutionally vague than Kolender v. Lawson, or Brown v. Texas, as at least the States (California and Texas respectively) had laws on the books to demand a name or I.D. The petitioner, being a layman sees no standard of conduct in relation to providing ones name to a peace officer. The requirement that "a person, who loiters and wanders upon the streets, must present a "credible and reliable identification" and account for their presence when requested by a peace officer under circumstances that would justify a Terry stop was declared unconstitutionally vague. *Kolender v. Lawson*, 461 U.S. 353 (1983) (order denying motion to dismiss App. 14 para.8). The Statute was vague under the 14th amendment because it failed to clarify

what is contemplated by the requirement that a suspect provide credible and reliable information. What the Petitioner is trying to articulate is that at least the California statute had some sort of a requirement for I.D. where M.C.A 45-7-302 makes no such requirement at all, and doesn't specifically say that failure to provide a name or I.D. is an obstruction. It would seem to Petitioner, that if the California statute is struck down because it doesn't have enough specificity in telling you exactly what kind of I.D. is required, then M.C.A. 45-7-302 as it is being applied to Petitioner in this case would have even greater reason to be struck down, since it mentions no form of I.D. at all. The District Court cites *Custody and Parental Rights of D.S.*, 2005 MT 275 P's 15 & 16. "The person challenging a statue as vague must prove that no standard of conduct is specified at all". Petitioner maintains that M.C.A 45-7-302 doesn't prove any standard of conduct at all in regards to refusal to identifying oneself as a crime, or a duty to identify oneself. Also cited in this argument "A statute is void for vagueness in Montana if it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden ". Petitioner is a person of ordinary intelligence and would think he has the Miranda right to silence, thus exercising that right is not a crime. M.C.A. 45-7-302 is written so broadly that a person who is guilty of murder, but refuses to confess during an interrogation would be guilty of obstruction. However he would obviously be well within his Fifth Amendment right to not confess.

D. The Petitioner was under arrest before being asked his name, thus his Miranda right to silence began at that time. Petitioner contends that being

placed in the dirt face down and handcuffed easily meets any definition of arrest. The state contends that this was just a terry stop and Matkin put handcuffs on for his own protection, even thought Matkin admits he had the Petitioner in custody (police report). Matkin could have used the word arrest just as easily as custody.

> "A Terry stop or seizure cannot resemble a traditional arrest" *Dunaway v. New York,* 442 U.S. 200, 212 (1979)
>
> "There can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." *Miranda v. Arizona,* 384 U.S. 436,467 (1966).
>
> "The Officer may ask the terry detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond" *Berkemer v. McCarty,* 468 U.S. 420,439 (1984).

The State insists that this was just a Terry Stop, and not an arrest, but nowhere in Terry is mention made of placing someone face down in the dirt in handcuffs. The actions of Deputy Matkin converted this into an arrest before any questions were asked. Defendant, being a layman, and not a licensed attorney who has gone to law school for 7 years, understands the word anything in the Miranda Warning to mean just that. The warning is designed

to make it easy for the average man on the street to understand its meaning. If the Miranda Warning has exceptions then it should be reworded, otherwise the common man on the street will have to go to law school to understand what those exceptions are and when they apply.

2. The Montana Supreme Court denied Petitioner equal protection and due process under the First, Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution, by not allowing him to testify in his own defense at trial. This petition for writ of certiorari presents a simple question: may the State of Montana deny a defendant equal protection and due process by not allowing him to testify due to his religious beliefs? Petitioner filed a document "notice of refusal to swear an oath or affirm" nearly one month ahead of trial, citing his religious beliefs and relevant federal case law, (App. 22). At trial, when petitioner is not allowed to testify, Judge Rice admits he didn't even bother to read the notice (trial transcripts page38-39). The Montana Supreme Court claims that no denial of equal protection and due process took place and that petitioner failed to provide legal authority or argument to support his contentions (App. 7 para. 14). Petitioner cites the verse out of the bible that prohibits anything beyond a yes or no answer. Petitioner then cites Gordon v. Idaho, 778 F.2d 1397, 1400-01 9th Cir.(1985). Gordon also refused to take an oath or affirm due to religious beliefs and wasn't allowed to testify. The 9th circuit ruled that the District Court erred by not probing to find a way for Gordon to testify that would not offend his religious beliefs, and subsequently reversed. In Petitioner's case, the District Judge had plenty of time to read the notice, look up Gordon v. Idaho, and

do the same thing to allow petitioner to testify. This denial of equal protection and due process should by itself be enough reason to reverse.

CONCLUSION

This petition presents an opportunity in which to better understand Miranda rights, and further define the Fifth, Sixth and Fourteenth Amendments of the U.S. Constitution. The opinion below is clearly erroneous as a matter of law, fails to comport with reason, logic and common sense, conflicts with the 9th Federal Circuit, intent of Montana lawmakers, and most importantly previous case law of this Court. So as to protect the Constitution and laws of the United States, and prevent a slide down the slippery slope to a police state, Petitioner prays that this Court issue a writ of certiorari and vacate the judgment of the Montana State Supreme Court.

Respectfully submitted,

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DA 08-0249
IN THE SUPREME COURT OF THE STATE OF MONTANA 2009 MT 90N

STATE OF MONTANA,
Plaintiff and Appellee,
v.
JOSH A. ALLEN,
Defendant and Appellant.

APPEAL FROM: District Court of the Twelfth Judicial District, In and For the County of Hill, Cause No. DC-2007-110 Honorable David G. Rice, Presiding Judge
COUSEL OF RECORD:
For Appellant: Josh A. Allen, (self represented), Havre, Montana
For Appellee: Hon. Steve Bullock, Montana Attorney General, Mark W. Mattioli, Assistant Attorney General, Helena, Montana
Cyndee L. Peterson, Hill County Attorney, Lindsay A. Osbourne, Deputy County Attorney, Havre, Montana

Submitted on briefs: February 25, 2009
Decided: March 24 2009

Justice Patricia O. Cotter delivered the Opinion of the Court.

1. Pursuant to Section I, Paragraph 3(d)(v), Montana Supreme Court 1996 Internal Operating Rules, as amended in 2003, the following memorandum decision shall not be cited as

precedent. It shall be filed as a public document with the Clerk of the Supreme Court and its case title, Supreme Court cause number and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

2. Josh A. Allen (Allen) appeals his conviction for obstructing a peace officer, a misdemeanor in violation of 45-7-302, MCA, in the Twelfth Judicial District Court, Hill County. For the reasons set fourth below, we affirm Allen's conviction.

3. On March 22, 2007, at approximately 2:15 a.m., Hill County Deputy Sheriff Cory Matkin (Deputy Matkin) was on routine patrol in Havre, Montana. Deputy Matkin noticed a male, who later turned out to be Allen, walk from the vicinity of Kentucky Fried Chicken restaurant and duck out of sight into a hedge at the corner of a nearby office building. Deputy Matkin drove by the building and saw the same person run into an alley at fairly high speed. Deputy Matkin suspected that the person had seen him and was running away to avoid detection and contact with an officer, so he followed him in his patrol car. As Deputy Matkin later testified, he wanted to stop the individual to determine why he was running from him, suspecting that his evasion might be because of a warrant, violation of probation or pretrial release conditions, or because he had committed an offense in the area.

4. Deputy Matkin eventually caught up with Allen, and activated the siren on his patrol car. Allen stopped and dropped to the ground at Deputy Matkin's request. Deputy Matkin then placed Allen in handcuffs, as his past experience with people who run from officer suggested they were likely to fight.

Allen made no threatening moves and did not struggle with Deputy Matkin.

5. Deputy Matkin then asked Allen why he had been running. Allen asked Deputy Matkin if he was under arrest or being detained, and Deputy Matkin responded that it was a detention. According to the District Court's factual findings in this matter, when Allen was "told it was a detention, he said he was exercising his right not to incriminate himself." When Deputy Matkin asked Allen his name, Allen refused to provide it. Deputy Matkin informed Allen that he was investigating his reason for running from him, and that he was obstructing the investigation by refusing to talk to him. When Allen continued to refuse to provide his name, Deputy Matkin arrested him for obstructing a peace officer.

6. Allen was subsequently convicted in justice court, and appealed to the District Court for a de novo bench trial. Prior to trial, Allen filed a motion to dismiss the obstructing charge on the grounds that Deputy Matkin lacked probable cause to arrest him and that his constitutional rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution were violated by his arrest and the charge itself. The District Court Denied the motion. The District Court concluded that there was particularized suspicion to detain Allen based on the circumstances of the case. The District Court also reasoned that Allen's running from Deputy Matkin, couple with his refusal to provide his name after being told of the investigation, provided probable cause to arrest and charge him with obstructing. Additionally, the District Court rejected Allen's arguments that he had a constitutional right not to provide Deputy

Matkin with his name, and that the obstructing statute was unconstitutionally vague.

7. At trial, Allen refused to take an oath or affirm based on his personal religious beliefs, and was not allowed to testify. Allen was subsequently convicted at bench trial and this appeal followed.

8. Allen raises a number of issues on appeal which we restate as follows. First, Allen asserts that Deputy Matkin did not have particularized suspicion to detain him or probable cause to arrest and charge him. Second, Allen asserts that his refusal to provide his name to Deputy Matkin was protected by the self-incrimination clause of the Fifth Amendment of the United States Constitution. Third, Allen maintains that the obstructing statute under which he was convicted is unconstitutionally vague. And fourth, Allen maintains that he was denied equal protection and due process when the District Court refused to allow him to testify based on his refusal to take an oath or affirm.

9. The grant or denial of a motion to dismiss in a criminal case presents a question of law which we review de novo. *State v. Howard,* 2008 MT 173, Para.8, 343 Mont. 378, 184 P.3d 344. Our review of a motion to dismiss is plenary, and we determine whether the district court's conclusions of law are correct. *Howard,* Para. 8. Any findings of fact in support of a district court's denial of a motion to dismiss are reviewed under the clearly erroneous standard. *Howard*, Para. 9.

10. We conclude the District Court did not err in denying Allen's motion to dismiss. We agree with the District Court that there was particularized suspicion to justify the stop of Allen and probable

cause to arrest him for obstructing. Particularized suspicion is based on objective data from which an officer can infer that the person stopped is or has been engaged in wrongdoing. *Brown. v. State*, 2009 MT 64, Para. 20,___Mont.___,___P.3d___. Whether particularized suspicion is present is based on the totality of the circumstances. *State v. Fellers*, 2004 MT 321, Para. 21, 324 Mont. 62, 101 P.3d 764. Probable cause to arrest is established when the facts and circumstances within an officer's personal knowledge are sufficient to warrant a reasonable person to believe that someone is committing or has committed and offense. *State v. Williamson*, 1998 MT 199, Para. 12, 290 Mont. 321, 965 P.2d 231. Here, Allen's evasive behavior at 2 a.m. provided sufficient particularized suspicion for Deputy Matkin to detain him, and his ensuing refusal to provide his name supplied probable cause to arrest and charge him with obstructing under these circumstances.

11. In this connection, we also agree with the District Court that Allen's right against self-incrimination did not protect him from having to provide his name to Deputy Matking. The privilege against self-incrimination protects an individual from being compelled to implicitly or explicitly disclose information or relate factual assertions of an incrimination nature. *Hiibel v. Sixth Jud. Dist. Ct. of Nevada, Humbolt Co., 542 U.S. 177, 189, 124 S. Ct. 2451, 2460 (2004).* A disclosure of a suspect's name will not implicate the self-incrimination clause if it presents "no reasonable danger of incrimination." *Hiibel*, 542 U.S. at 189, 124 S. Ct. at 2460. Allen asserted that he did not provide his name because he was afraid he would be arrested for outstanding speeding tickets. However, this

allegation was unsubstantiated, as a criminal history and warrants check run on Allen after his arrest showed no outstanding warrants or criminal history. This being so, the act of providing his name provided no reasonable danger to Allen that he would incriminate himself, nor would it furnish a link in a chain of evidence which could be later used to prosecute him. *Hiibel,* 542 U.S. at 190, 24 S. Ct. at 2461. Thus, the disclosure of Allen's name to Deputy Matkin, under the circumstances of this case, would not have been incriminating.

12. We also agree with the District Court that the obstructing statute under which Allen was charged and convicted was not unconstitutionally vague. This statute reads as follows:

Obstructing peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant it the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of peace, or the performance of a governmental function, including service of process. (2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

Section 45-7-302)(1)and(2), MCA.

13. We presume statutes are constitutional, and the party challenging a statute bears the burden of proving the statute's invalidity beyond a reasonable doubt. *In re Custody and Parental Rights of* D.S., 2005 MT 275, Para. 15, 329 Mont. 180, 122 P.3d 1239. A statute is vague on its face if it fails to give a person of ordinary intelligence fair notice that her

contemplated conduct is forbidden. *Custody of* D.S., Para. 16. The party challenging a statute for vagueness faces a high burden of proof in showing that the statute specifies "no standard of conduct....at all" which is prohibited. *Custody of D.S., Para. 16 (quotation omitted).* We agree with the District Court that Allen failed to meet his high burden. The obstructing statute does give fair notice to a person of ordinary intelligence of the prohibited conduct and is not unconstitutionally vague.

14. Finally, we conclude that the District Court did not deny Allen his equal protection or due process when it required him to take an oath or affirm as a precondition to testifying in court. M.R. Evid. 603 states that "[b]efore testifying, every witness shall be required to declare that the witness will testify truthfull, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." *See also Gordon v. Idaho,* 778 F.2d 1397, 1400-01 (9th Cir. 1985) (discussing the federal counterpart to M.R. Evid. 603). Allen has simply failed to show that the imposition of the oath or affirmation requirement of M.R. Evid. 603 has denied him equal protection of the laws, due process, or otherwise impinged upon his rights. While Allen asserts that certain tenets of his faith prevent him from complying with this rule, he has provided no legal authority or argument to support his contention that he should be completely excused from the oath or affirmation requirement in M.R. Evid. 603 prior to giving testimony in court.

15. We have determined to decide this case pursuant to Section 1, Paragraph 3(d)(v) of our 1996 Internal Operating Rules, as amended in 2003,

which provides for memorandum opinions. It is manifest on the record before us that the District Court did not err in its disposition of this matter when it denied Allen's motion to dismiss and subsequently convicted him of obstructing. Therefore, we affirm.

Hon. David G. Rice
District Judge
Hill County Courthouse
Havre, MT 59501
Tel: 406-265-5481, Ext 231

2008 March, 27

MONTANA TWELFTH JUDICIAL DISTRICT COURT, HILL COUNTY

THE STATE OF MONTANA	)Cause No. DC-07-110
Plaintiff,	)
Vs	) **ORDER DENYING**
JOSH ABEL ALLEN,	) **MOTION TO**
Defendant.	) **DISMISS**

STATEMENT OF THE CASE: Defendant appeals a conviction in Hill County Justice Court for the offense of Obstructing a Peace Officer. He filed a motion to dismiss the charge in this Court because he feels the officer lacked probable cause and his 1st, 4th, 5th, and 14th Amendment rights were violated by the charge. The State resists the motion and argues that there was particularized suspicion for the stop, probable cause for the arrest, and no reason to dismiss the charge for constitutional reasons. Essentially, Defendant argues that he could not be required to give his name to the officer an if the statute requires that, it is unconstitutionally vague. The Court received evidence at a hearing on March 3, 2008. Hill County Deputy Sheriff Cory Matkin

testified and was cross-examined by Defendant, who appeared without counsel. Hill County Deputy County Attorney Lindsay Osbourne appeared for the State. Both parties filed briefs before the hearing so the Court considers the matter submitted for decision.

ISSUES:

1. Whether particularized suspicion justified detention of Defendant.

2. Whether probable cause supported issuance of the complaint.

3. Whether Defendant had a constitutional right to refuse to give his name to an officer.

4. Whether 45-7-302, MCA, is unconstitutionally vague.

FINDINGS OF FACT: In addition to any finding of fact stated on the record at the hearing of this motion, the Court enters the following findings:

1. Deputy Matkin was on patrol at about 2:15 a.m. on March 22, 2007, in the west end of Havre, Hill County, Montana. Matkin is an experienced officer with a number of years of service and training for his current position of Deputy Sheriff.

2. In the area of Kentucky Fried Chicken and the professional office of Dr. Beardsley, Matkin saw a male walk across from KFC and then duck out of sight into a hedge at the northwest corner of the professional building. As Matkin drove near the building, the person ran along the north side, turned south, and then ran west into the alley at a high speed run.

3. As Matkin suspected the person had seen him and may be running to avoid detection and contact with an officer, he drove around the professional building and followed the person down the alley. Matkin wanted to stop the person and determine why he was running away. He suspected the person's evasion might be because of a warrant, probation conditions, pretrial release conditions, or that he was an offender for some offense in the area.

4. As Matkin caught up to the person behind KFC, across the street from the professional building, he hit his siren. The person then stopped and got on the ground as requested by the deputy. He placed the person in handcuffs as his experience with people who run suggested they could be fighters. The person made no threatening moves and did not struggle with the officer.

5. When Matkin asked the person why he was running away, he asked the deputy if this was a detention or arrest. When he was told it was a detention, he said he was exercising his right not to incriminate himself. Matkin then asked his name to check his status. Again the person refused to answer saying that he was not talking to the officer.

6. Deputy Matkin then told the person that he was investigating his reason for running and he was obstructing that investigation by refusing to talk to him. Matkin wanted to determine the person's identity and detain him if necessary. In addition, by detaining him, he could check the area for evidence of an offense and know his identity if later investigation connected to him to any offense. Even

after Matkin told the person he was obstructing him by refusing to tell him his name, he refused to tell him.

7. Matkin then arrested the person for refusal to tell him his name. He later found out the Defendant's name after he was taken to the detention center. Deputy Matkin then issued him a ticket in violation of 45-7-302 MCA, in Hill County Justice Court and stated that Defendant obstructed a peace officer "by fleeing from a deputy on foot and failing to identify himself upon apprehension". (See notice to Appear and Complaint).

LEGAL PRINCIPLES:

1. The Court has jurisdiction over this matter. Montana requires that a peace officer stop a person only after the officer has developed a particularized suspicion to warrant the stop.46-5-401 (1), MCA. To paraphrase "particularized suspicion" , an officer must have objective facts from which an experienced officer can make inferences that lead to a suspicion that a person has committed, is committing, or is about to commit an offense. *State v. Gopher,* 193 Mont. 189, 194, 631 P.2d 293, 296 (1981). It continues to be reaffirmed that the totality of the circumstances surrounding the stop are to be considered. *State v. Grindeland,* 2001 MT 196, 306 Mont. 262, 265, 32 P.3d 767.

2. "A peace officer who has lawfully stopped a person or vehicle under this section may: (a) request the person's name and present address and an explanation of the person's action...."46-5-401 (2) (a),

MCA. There is no criminal penalty attached to this statute.

3. " A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace or the performance of a governmental function, including service of process. 45-7-302 (1), MCA.

4. "When a complaint is presented to a court charging a person with the commission of an offense, the court shall examine the complaint or any affidavits, if filed, to determine whether probable cause exists to allow the filing of a charge." 46-11-110 MCA. "The charge must be in writing and in the name of the state or the appropriate county or municipality and must specify the court in which the charge is filed. The charge must be plain, concise, and definite statement of the offense charged, including the name of the offense, whether the offense is a misdemeanor or felony, the name of the person charged, and the time and place of the offense as definitely as can be determined. The charge must state for each count the official or customary citation of the statute, rule regulation, or other provision of laws that the defendant is allege to have violated." 46-11-401, MCA.

5. "Probable cause to arrest is established if the facts and circumstances within an officer's personal knowledge....are sufficient to warrant a reasonable person to believe that someone is committing or has committed an offense". State v. Williamson, 1998 MT 199 Para. 12.

6. " Sections 45-2-101 (34) (statutory definition of "knowingly") and 45-7-302 (1), MCA, require that an individual obstructing a peace officer must engage in conduct under circumstances that make him or her aware that it is highly probable that such conduct will impede the performance of a peace officer's lawful duty. In other words, the City had to prove that Cameron was aware that his conduct would hinder the execution of the Officer's duties." *City of Kalispell v. Cameron,* 2002 MT 78, Para. 11. "One may obstruct an officer by refusing a request to state one's name and address, to produce identification, or to show a driver's license. However, this assumes that the failure hindered the officer in performing a duty." 58 Am Jur 2d "Obstructing Justice" 62.

7. In *Brown v. Texas,* 443 U.S. 47 (1979), a conviction for Defendant's failure to identify himself was overturned because the officers who made the arrest did not have any reasonable suspicion to suspect Defendant of any criminal conduct.

8. The requirement that a person, who loiters and wanders upon the streets, must present a "credible and reliable identification" and account for their presence when requested by a peace officer under circumstances that justify a *Terry* stop was declared unconstitutionally vague. *Kolender v. Lawson,* 461 U.S. 353 (1983). The statute was vague under the 14th Amendment because it failed to clarify what is contemplated by the requirement that a suspect provide credible and reliable identification. Too much discretion was placed in officers so that the average

person could not determine compliance with the law. A statute is void for vagueness in Montana if it fails to give a person of ordinary intelligence fair notice that contemplated conduct is forbidden. The person challenging a statute as vague must prove beyond a reasonable doubt in that no standard of conduct is specified at all. *Custody and Parental Rights of D.S.*, 2005 MT 275 Para. 15 &16.

9. The disclosure of a Defendant's name and other expressions of a voice is not testimonial and therefore neither suppressible nor in violation of *Miranda*. *State v. Devlin,* 1999 MT 90 Para. 21. There is no violation of the right to remain silent, unreasonable search and seizure, of violation of free speech.

ANALYSIS: Defendant has requested dismissal of the Complaint in a pre-trial setting. The Court can easily find that particularized suspicion existed for Deputy Matkin to stop Defendant. At that late hour, a person who runs when a police car is present warrants contact. While the person may not be involved in any criminal activity, the officer has a duty to be sure he is not wanted or in violation of release conditions. In addition, the officer has a legitimate reason to identify the person in case some offense is later discovered. Deputy Matkin's reasons for stopping Defendant are very reasonable in light of his experience. While it is not an offense to run unless Defendant knows that the officer is after him, running from an officer is certainly a suspicious activity at that time of night. All that must be found for particularized suspicion is present as Deputy Matkin pursued Defendant. Beyond that, once his name was requested and he was told that Matkin

was investigating his reason for running, he knew that he could be charged with obstruction. There does not need to be an actual crime for the officer to do his duty in checking out the reason for Defendant's furtive movements. The running couple with refusal to give a name after being told of the investigation establishes probable cause to charge the offense. Whether Defendant is actually guilty will be determined at trial. For now, a reasonable person could easily find grounds to believe that Defendant violated the statute by refusing to give his name after being told that he was detained to learn the reason for his running. He has no valid constitutional right to refuse to merely give his name. That was all that was asked.

Defendant's challenge to the constitutionality of the statute is not supported. The cases he cites do not support his argument. Particularized suspicion is present here so *Brown* does not apply. The Supreme Court never reached the constitutionality of the statute in Texas. The Montana statute clearly requires the State to prove a person knowingly violates the law by acts that obstruct, impair, or hinder enforcement of the criminal law, preservation of the peace, or the performance of a governmental function. Nothing could be plainer for a person who runs from an officer to know that the officer wants to know why he is running. Whether he is actually guilty is for trial. However, the officer must establish the obstruction and show what is being interfered with by a defendant's acts. There are a number of cases like *Cameron*, where the acts of a defendant do not reach that level and the charges must be dismissed. That is not the case at this stage of this pre-trial proceeding as the Court has not yet

heard the State's case. Defendant's citation to *Kolender* is also not persuasive as the Montana statute requires the officer to show that his activity meets the statute and Defendant's acts obstruct that activity. The Montana statute has been in place for many years without challenge to its constitutionality for vagueness. In this case, it is not merely the running that resulted in the charge, but the running and later refusing to answer a simple question about his name. While Defendant promptly stopped, and is not guilty of anything at that stage, once he knew that the officer was investigating his activity and wanted to know his name, he was on notice that the officer was performing his duty. Whether he obstructed the officer's duty is for trial. However for now, the charge will not be dismissed.

CONCLUSIONS OF LAW:

1. Particularized suspicion was present for the stop of Defendant and probable cause to charge him arose after the stop.

2. Defendant had no constitutional right to refuse to give his name to Deputy Matkin.

3. 45-7-302, MCA, is not unconstitutionally vague.

Based on the above Findings and Conclusions of Law, Defendant's motion to dismiss is DENIED. This matter will proceed to trial before the Court without a jury.

DATED this 26th day of March, 2008 District Judge

Hon. David G. Rice
District Judge
Hill County Courthouse
Havre, MT 59501
Tel: 406-265-5481, Ext 231

2008 March, 28

MONTANA TWELFTH JUDICIAL DISTRICT COURT, HILL COUNTY

THE STATE OF MONTANA)Cause No. DC-07-110
Plaintiff,)
Vs) **JUDGEMENT**
JOSH ABEL ALLEN,)
Defendant.)

This matter came before the Court for bench trial on March 27, 2008. Defendant appeared Pro Se and the State was represented by Lindsay A. Osbourne, Deputy Hill County Attorney.

Testimony was presented, and the court found defendant guilty of Obstruction a Peace Officer, a misdemeanor. Therefore,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED, as follows:

1. Defendant is guilty of the offense of **Obstructing a Peace Officer, a misdemeanor,** in violation of 45-7-302, MCA.

2. Imposition of sentence is deferred for six (6) months, subject to the following conditions:

a. Defendant shall pay a fine of $100.00, with credit for time previously served, thus discharging the fine.

b. Defendant shall pay the mandatory $15.00 prosecution fee, $50.00 victim's fee and $20.00 surcharge.

c. Defendant shall remain law abiding.

d. Defendant must keep in contact with the Hill County Attorney's office and notify them of any change of address.

3. Sentence is stayed pending appeal to the Montana Supreme Court.

ORDERED from the bench the 27th day of March, 2008. Dated this 28th day of March, 2008.

JUDGE OF DISTRICT COURT

IN THE SUPREME COURT OF THE STATE OF MONTANA

DA 08-0249

FILED MAY 12, 2009

STATE OF MONTANA,

Plaintiff and Appellee

v.

JOSH A. ALLEN,

Defendant and Appellant.

Petitioner Josh A. Allen, appearing as a self-represented litigant, has filed a Petition for Rehearing in the captioned matter, and the State of Montana has filed a response objecting to the Petition. Due consideration having been given to the Petition, IT IS HEREBY ORDERED that the Petition for Rehearing is DENIED. IT IS FURTHER ORDERED that the Clerk of this Court serve a copy of this Order upon counsel of record and upon Allen at his last known address. Dated this 12 day of May, 2009.

1st Amendment U.S. Constitution. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

5th Amendment U.S. Constitution. No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

6th Amendment U.S. Constitution. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense

14th Amendment U.S. Constitution. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which

shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

45-7-302. Obstructing peace officer or other public servant. (1) A person commits the offense of obstructing a peace officer or public servant if the person knowingly obstructs, impairs, or hinders the enforcement of the criminal law, the preservation of the peace, or the performance of a governmental function, including service of process.

(2) It is no defense to a prosecution under this section that the peace officer was acting in an illegal manner, provided that the peace officer was acting under the peace officer's official authority.

(3) A person convicted of the offense of obstructing a peace officer or other public servant, including a person serving process, shall be fined not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.

46-5-401. Investigative stop and frisk. (1) In order to obtain or verify an account of the person's presence or conduct or to determine whether to arrest the person, a peace officer may stop any person or vehicle that is observed in circumstances that create a particularized suspicion that the person or occupant of the vehicle has committed, is committing, or is about to commit an offense. If the stop is for a violation under Title 61, unless emergency circumstances exist or the officer has reasonable cause to fear for the officer's own safety or for the public's safety, the officer shall as promptly as possible inform the person of the reason for the stop.

(2) A peace officer who has lawfully stopped a person or vehicle under this section may:

(a) request the person's name and present address and an explanation of the person's actions and, if the person is the driver of a vehicle, demand the person's driver's license and the vehicle's registration and proof of insurance; and

(b) frisk the person and take other reasonably necessary steps for protection if the officer has reasonable cause to suspect that the person is armed and presently dangerous to the officer or another person present. The officer may take possession of any object that is discovered during the course of the frisk if the officer has probable cause to believe that the object is a deadly weapon until the completion of the stop, at which time the officer shall either immediately return the object, if legally possessed, or arrest the person.

(3) A peace officer acting under subsection (2) while the peace officer is not in uniform shall inform the person as promptly as possible under the circumstances and in any case before questioning the person that the officer is a peace officer.

Josh A. Allen

P.O. box 1621

Havre, MT 59501

(406) 265-2614

MONTANA TWELFTH JUDICIAL DISTRICT, HILL COUNTY HONORABLE DAVID G. RICE DISTRICT JUDGE HILL COUNTY COURTHOUSE HAVRE, MONTANA

THE STATE OF MONTANA plaintiff	)CAUSE NO. DC-07-) 110
vs Josh A. Allen defendant	NOTICE OF REFUSAL TO SWEAR *OR AFFIRM OR TAKE AN OATH*

COMES NOW the Defendant, Josh A. Allen, to enter a NOTICE OF REFUSAL TO SWEAR OR TAKE AN OATH, to wit: According to the Defendant's truly and sincerely held religious beliefs from the bible the Defendant cannot swear or take an oath. The Defendant cannot Affirm either, as this is synonymous with swearing, this issue was taken before the court in Gordon v. Idaho. The Defendant would ask the court to accept this as dicta, and respect the Defendant's religious beliefs in this preliminary hearing and trial. *The bible instructs in the book of James, 5:12 "But above all, my brethren, do not swear, either by heaven or by earth or with any other oath, but let your yes be yes and your no be no, that you may not fall under condemnation".*

This instruction is repeated at Matthew 5:33-5:37 "Again you have heard that it was said of the men of old, 'you shall not swear falsely, but shall perform to the Lord what you have sworn.' But I say to you, Do not swear at all, either by heaven, for it is the throne of God, or by earth, for it is his footstool, or by Jerusalem, for it is the city of the great King. And do not swear by your head, for your cannot make one hair white or black. Let what you say be simply 'Yes' or 'No'; anything more than this comes from evil." The Defendant does agree to tell the truth, and it should be pointed out that swearing to tell the truth, or taking an oath hasn't stopped anyone from lying anyway.

Dated this 29th day of February, 2008

Respectfully Submitted

Pro Se